No. 3199

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY (a corporation), claimant of the American Steam Tug "Fearless", her boilers, engines, tackle, apparel and furniture,

Appellant,

vs.

A. H. BULL & COMPANY, INC. (a corporation),

Appellee.

APPELLEE'S REPLY TO APPELLANT'S PETITION FOR A REHEARING.

E. S. PILLSBURY,
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ALFRED SUTRO,
OSCAR SUTRO,
Proctors for Appellee.

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Appellant asks for a rehearing and complains that the opinion in this case "is written as if the brief had never been filed or the argument heard".

It is also urged that the opinion "does not touch on the five principal points" raised in appellant's briefs and argument. The petition for rehearing specifies the five points "ignored by the opinion".

I.

The first point appears to be that the captain of the "Edith" failed to use his engines after the tug had

dropped the tow line. But the testimony of all of the witnesses on both sides of the case was that it was the duty of the captain of the "Edith" to forthwith stop his engines when the tow line was cast off, so as to prevent the fouling of the line in the wheel. Such was the testimony of the tug witness Driver (Apostles 143-144), the tug witness Kratz (Apostles 186), the tug captain himself (Apostles 339), and the manager of the claimant (Apostles 255. See Appellee's Brief, pp. 14-16, p. 38.).

Despite this state of the record, appellant now appears to claim that the captain of the "Edith" should have turned his engines forthwith upon the tug's dropping the tow. Until this contention was made, and up to the time of the filing of the petition for rehearing, we understood that it was practically a conceded point in the case, based upon the unanimous testimony of all of the witnesses, that it was the duty of the captain of the "Edith" to stop his engines and to haul in the cast off line with his engines at rest. The record shows that while he was hauling in the line with his engines still, he was bound to drift towards the piers (Appellee's Brief, pp. 11-16). The record clearly supports the conduct of the captain in not performing the unseamanlike act of turning his propeller with a tow line hanging from the stern of the ship, and this whether he feared the line was already fouled in the wheel or whether he hoped to haul in the line before it fouled the wheel.

That the point was not overlooked in this honorable court's opinion is apparent from the statement by Judge Ross that the tug's captain

> "without giving any notice whatever of his intention so to do, let go the tow line, which soon got

into the wheel, thus fouling the ship's propeller *and making necessary the stopping of her engines.''*

The finding that the action of the tug's captain made it necessary to stop the engines of the ''Edith'' is the only possible conclusion on the record in this case, and is in conformity with the testimony of the witnesses for the tug itself (Appellee's Brief, pp. 11-16, 38-39).

II.

Appellee's second point ''ignored by the opinion'' is that the master of the ''Edith'' was at fault for not communicating to the captain of the tug the fact that the ''Edith'' intended to stop her engines after the tug cast off the tow. But it appears from the testimony of the captain of the tug that he would expect the master of the ''Edith'' to stop his engines after the tow line was cast off (Apostles 324, 325), and the other witnesses, members of the crew of the tug, testified that after the tow line was cast off the captain of the ''Edith'' ''would have to stop his engines to pull in that line'' (Apostles 143, 186). The action of the captain of the ''Edith'' in stopping his engines was directly called for by the action of the tug in casting off the line. The tug could not expect the ''Edith'' to turn her engines with the tow line in the water. If it was good seamanship for the captain of the ''Edith'' to stop his engines (see testimony of tug captain, Apostles 324), the tug captain should have known that such a course would be, as it was, followed.

III.

The third point "ignored by the opinion", and urged as a ground for rehearing, seems to be substantially a repetition of the second point. Appellant urges that "if the tug had known" that the "Edith's" engines would be stopped after the line was cast off, the tug would have taken a stern line and pulled the "Edith" "directly backwards". So far as we are aware this position is new. Nowhere in the record have we found the suggestion that when the tug ceased pulling on the "Edith's" stern and dropped the tow line, compelling the "Edith" to stop her engines until the line was hauled in, the tug should have been given an opportunity to take another line, or pick up the same line, and continue doing what it had ceased to do without notice to the "Edith" and again pull the "Edith's" stern backwards through the water. Just what the purpose of such a maneuver would be is not clear. Certainly it was not testified to by any witness, nor, so far as we know, heretofore urged. In fact we submit the suggestion is wholly inadmissible.

IV.

The fourth point 'ignored by the opinion" is that if the tug had been advised that the maneuver was in its hands, it could have ordered the "Edith" to drop her anchors. This point was expressly commented upon in the closing paragraph of the opinion of Judge Ross, in which he said that the court is not

> "able to agree with the proctors for the appellant that the master of the ship should be held in fault in failing to drop her anchors, the condition of the wind and water, and the location of the ship with respect to the various piers being duly considered."

Appellant now advances the theory that if the captain of the tug had known that the "Edith's" engines were to be stopped, he "could have ordered the 'Edith' to drop her anchors". But, as we have already observed, the captain of the tug should have known and must have intended when the tow line was cast off that the engines of the "Edith" should be stopped until it was hauled in, and by the time it was hauled in she was in a position of danger where her anchors could not be dropped (see Apostles 314). And certainly the captain of the tug, who expected, after dropping the stern line, to run around and take a bow line from the "Edith", could not have expected the "Edith" to drop her anchors while his maneuver, which involved pulling her into the wind and tide by her bow, was in process of performance (Appellee's Brief, pp. 34-36). It is equally certain that the tug would have claimed immunity from responsibility for any damage which might have resulted if the "Edith" had dropped her anchors and thus blocked the tug's maneuver.

V.

The fifth point "ignored by the opinion" relates to the failure of the tug to arrange with the captain of the "Edith" in regard to the method of performance of the maneuver. Judge Ross not only announced the conclu-

sions of the court on this subject, but did so with considerable detail. Not only is the point not ignored by the opinion, but it is the subject-matter of pages 2 to 5 of the opinion, which concludes:

> "Such a movement on the part of the tug was not only not directed by the master of the ship, but was directly contrary to the latter's own movement and plan, and was commenced without the slightest notice to the ship of the tug's action."

The point is discussed in appellee's brief, pages 5 to 11, and we think the record is very clear that the tug, contrary to the claimant's rule on the subject, proceeded in this case to conduct an independent maneuver without advising the captain of that fact. Its duty as an assistant tug was to follow the ship's maneuvers and orders. The tug had no right, without notice to the "Edith", to cast off a tow line which no emergency required it to drop, and which it could have held on to with perfect safety, and which the maneuver planned by the "Edith's" captain required it to hold.

VI.

To the sixth point of the petition for rehearing, we reply that it was the "Edith's" duty to forthwith stop her engines when the tow line was cast off and until it was hauled in; and by the time it was hauled in she had drifted into a position of danger where her anchors could not be safely dropped (Appellee's Brief, p. 34).

The case of *The Westchester,* 254 Fed. 576, which counsel says he considers opposed to the decision in this

case, is not in the remotest degree in conflict with anything in the opinion of this court.

In that case a tug in tow of a barge became disabled by the breaking of her propeller shaft. The tug immediately anchored. The barge had no anchor and the hawser parted. The Circuit Court of Appeals for the Second Circuit held that the barge was negligent for not having an anchor. Her failure to drop an anchor contributed to the accident. After the tug anchored there was only one possible maneuver for the barge, and that was to drop an anchor. She undoubtedly would have done so if she had not gone out negligently without anchors.

The case is entirely different from the case at bar. The "Edith" was equipped with anchors. The point in the present case was not that the "Edith" was not prepared to drop her anchors, but that she was not called upon by the tug's maneuver to do so (Appellee's Brief, pp. 33-37). In fact the conclusions of this court and of the trial court were that the master of the "Edith" was not to be blamed for not dropping her anchors. In this case the maneuver, after the tug dropped the "Edith's" tow line, continued in full operation and would have been interfered with by the dropping of anchors. In the case of the "Westchester" when the tug dropped her anchor it was plainly the duty of the barge to drop her anchor. The negligence of the barge in having no anchor contributed directly to the accident in that case. We submit the cases are in no way parallel.

The accident in this case was caused by the tug dropping a tow line without notice to her tow, and under-

taking a perilous maneuver, which the tug failed to accomplish. The record shows that the tug was not even properly equipped with lines for the performance of the operation it had undertaken. Had the tug held on to the stern line, which it took from the "Edith", the accident would not have happened. We submit that when the tug cast off the line without notice, it did so on its own responsibility, and that it is liable for the resulting damage.

We respectfully submit that the petition for rehearing should be denied.

Dated, San Francisco,
March 19, 1919.

E. S. Pillsbury,
F. D. Madison,
Alfred Sutro,
Oscar Sutro,
Proctors for Appellee.